U.S. Department of Justice
Office of the Solicitor General
Washington, D.C. 20530

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

February 9, 1984

BY FEDERAL EXPRESS

Anne E. Keating, Esquire
Chicago and North Western
Transportation Company
One North Western Center
165 North Canal Street
Chicago, Illinois 60606

Re: Hayfield Northern Railroad Company, Inc.
and Minnesota v. Chicago and North Western
Transportation Company, No. 82-1579

Dear Ms. Keating:

We believe it is appropriate and necessary for us to respond, on behalf of the United States as amicus curiae in this case, to the contentions concerning the Interstate Commerce Commission that you raised in your letter of February 3.

In our brief on behalf of the United States, we argued (at 26) that "the Interstate Commerce Commission has concluded that its abandonment authority does not extend past the point of abandonment and therefore has recognized that Section 10905 does not preempt a state's post-abandonment authority to condemn a rail line." In support of that proposition we cited (at 27-28) a number of public decisions by the Commission as well as an internal memorandum specifically prepared in connection with the instant case. We continue to believe that this is a fair and accurate argument and that it is not in any way discredited by the materials cited in your letter. A full recitation of the Commission's actions in this case confirms our view.

On April 5. 1982 appellee Chicago and North Western Transportation Company (CNW) asked the Interstate Commerce Commission to intervene in the district court in support of CNW's position that the Interstate Commerce Act preempts state condemnation of an abandoned rail line. On April 27, the General Counsel of the Commission submitted a memorandum to the Commission (J.S. App. A42-A50) recommending against the requested intervention on the following grounds (J.S. App. A42):

> First, we do not believe that CNW's position -- that federal law (49 U.S.C. 10905) preempts condemnation of the branch line under state law after the issuance of a certificate of abandonment -- is correct. Second, we see no substantial interest within the jurisdiction of the Commission which would warrant our intrusion into this sensitive area of federal-state relations.

The General Counsel later reiterated his conclusion that "the shippers have the best of the argument, and that once a rail line has been abandoned, Section 10905 can no longer be viewed as preempting a state law condemnation" (J.S. App. A45). Finally, while recommending against intervention, the General Counsel stated (J.S. App. A49):

> If, however, the Commission wishes to participate, we recommend that it authorize us to take the position that a Commission decision under Section 10905 establishing a subsidy or purchase price for purposes of that section does not preempt a subsequent condemnation proceeding under state law.

On May 4, the Commission (which at that time was composed of five members) "voted * * * to approve [the General Counsel's] recommendation * * * not to participate at the Chicago and North Western Transportation Co.'s request" (Att. A, infra). "In addition, the Commission agreed with Commissioner Gresham as to the position the Commission should take should the district court request Commission views" (ibid.); as expressed in Commissioner Gresham's memorandum (ibid.), that position was that "[a]fter consummation of an abandonment, an ICC decision under Section 10905 does not preempt a subsequent condemnation proceeding under state law." Thus, the Commission approved the very position later taken by the United States in its amicus brief. This action by the Commission was conveyed to counsel for CNW with an explicit

statement that "[t]he Commission believes that after the consummation of an abandonment * * * a Commission decision pursuant to 49 U.S.C. 10905 does not preempt a subsequent condemnation action under state law" (Att. B, infra).

Following the court of appeals' decision, the General Counsel recommended that the Commission not intervene in support of the petition for rehearing filed by appellants Hayfield Northern Railroad Company and the State of Minnesota (J.S. App. A50-A54). Although noting that "[w]e continue to believe that a reasonable case can be made that the existence of Section 10905 does not preempt all such state law actions" (J.S. App. A53; see also J.S. App. A54-A57), the General Counsel recommended against intervention because "we remained neutral to this point and do not believe that intervention is wise unless there are compelling reasons why the Eighth Circuit's decision will cause problems for the Commission" (J.S. App. A53). On December 27, the Commission (now comprising six members) voted not to intervene in the court of appeals (Att. C, infra).

After the court of appeals denied rehearing, appellants requested this Office, on behalf of the United States, to support their petition for a writ of certiorari (Att. D, infra). We contacted the General Counsel of the Commission and asked "to have the Commission's views" (ibid.). In response, the General Counsel prepared a draft letter in which he stated that "[o]nce abandonment has taken place pursuant to Commission authority * * * the Commission's interest in the rail line has ceased because the line has been found to be not required in interstate commerce. * * * * * [W]e generally support the contention of counsel for [Hayfield Northern] that the court of appeals finding of preemption was not mandated" (ibid.). This letter in substantially the same form was sent to our Office as the views of the General Counsel (J.S. App. A58-A63). Thereafter, the Commission approved the letter both in the draft form originally circulated (Att. E, infra) and in the final form transmitted to us by the General Counsel (J.S. App. A64); the Commission acted by a three-member majority, with two Commissioners dissenting (Att. E, infra).

On May 16, 1983, the Supreme Court invited this Office to express the views of the United States at the jurisdictional stage in this case. At our request, the General Counsel of the Commission prepared a draft brief; in accordance with the

position previously endorsed by the Commission, the draft argued "that Section 10905 does not preempt condemnation of abandoned rail property for railroad purposes because the Commission's jurisdiction ends when a carrier exercises a Commission-issued certificate of abandonment" (Att. F, infra). The General Counsel submitted the draft brief to the Commission to determine "whether the draft should contain the names of members of my office and as a result be taken to represent the Commission's views" (ibid.) By this time, however, the composition of the Commission had changed due to the resignation of one member (Commissioner Simmons) who had previously joined the majority in approving the Commission's position that Section 10905 does not preempt a state's post-abandonment condemnation. Because the remaining four Commissioners adhered to their earlier views, the Commission divided 2-2 and thus "failed to reach a majority on the request of the General Counsel [with regard to the draft brief]" (Att. G, infra). In light of this deadlock by the Commission, we submitted to the Supreme Court an amicus brief on behalf of the United States that did not list among the attorneys for the government the General Counsel of the Commission. The same practice was followed in our brief on the merits for the United States as amicus curiae; since the Commission's membership was unaltered, the General Counsel did not seek its views with respect to our merits brief.

As the foregoing discussion indicates, the Commission in this case considered and affirmatively endorsed on two separate occasions the position that was ultimately expressed in our brief for the United States. In addition, as our brief demonstrates, that position is consistent with and supported by a number of public decisions of the Commission in other cases. The 2-2 tie vote of the current Commissioners that you have noted certainly does not constitute a determination by the Commission to reject the views stated on behalf of the United States, and it in no way repudiates or overrules the official actions of the Commission, either in this case or in any other, that support our argument.

Very truly yours,

Rex E. Lee
Solicitor General

Enclosures

cc (w/enclosures): Hon. Alexander L. Stevas
Robert S. Abdalian, Esquire
(by Federal Express)
Gilbert S. Buffington, Esquire
Charles D. Hoornstra, Esquire
Dennis J. Downing, Esquire

ATTACHMENT A

OFFICE OF THE SECRETARY
Clearance Unit

No. 82-166

Re: Request for Commission Intervention in District Court Case Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co.--Abandonment Between Oelwein, Iowa and Randolph, Minnesota

May 5, 1982

MEMORANDUM TO GENERAL COUNSEL BROADLEY:

The Commission voted, by notation, on May 4, 1982, to approve your recommendation circulated April 29, 1982, not to participate at the Chicago and North Western Transportation Co.'s request. In addition, the Commission agreed with Commissioner Gresham as to the position the Commission should take should the district court request Commission views and to have you monitor the progress of this case and advise the Commission of any significant developments.

A copy of each vote is attached.

Kathy Link

cc: All Commissioners
Director Hardy
Director Hatton
Director Dahlgren
Secretary Mergenovich
Acting Deputy Director Gitomer

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MAY 5 2 36 PM '82
INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL

OFFICE OF CHAIRMAN TAYLOR

G. C. NO. 82-166

RE: REQUEST FOR COMMISSION INTERVENTION IN DISTRICT COURT CASE RELATED TO DOCKET NO. AB-1 (SUB-NO. 113)F, CHICAGO & NORTH WESTERN TRANSPORTATION CO. - ABANDONMENT BETWEEN OELWEIN, IOWA AND RANDOLPH, MINNESOTA

April 29, 1982

MEMORANDUM TO THE COMMISSION:

Attached is a recommendation from the General Counsel that the Commission not intervene in this proceeding.

I agree with his recommendation and so vote.

May I have your votes by C.O.B. Tuesday, May 4, 1982.

Reese H. Taylor, Jr.

cc: Clearance Unit
General Counsel Broadley

APR 29 4 35 PM '82
OFFICE OF THE SECRETARY RECEIVED

OFFICE OF VICE CHAIRMAN GILLIAM

G. C. No. 82-166

Re: Request for Commission Intervention in District Court Case Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co. - Abandonment Between Oelwein, Iowa and Randolph, Minnesota

May 4, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

I vote to approve the General Counsel's recommendation.

L.C.G.

GILLIAM

cc: All Commissioners
Office of the General Counsel
Section of Finance
Clearance Unit

MAY 5 7 21 AM '82
OFFICE OF THE SECRETARY RECEIVED

OFFICE OF COMMISSIONER GRESHAM

G. C. No. 82-166

Re: Request for Commission Intervention in District Court Case Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co. - Abandonment Between Oelwein, Iowa and Randolph, Minnesota

OFFICE OF THE SECRETARY RECEIVED MAY 4 4 17 PM '82

MAY 4 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

I vote to approve the General Counsel's recommendation not to participate at CNW's request. If the district court should later request our views, however, the Commission should participate. I vote to adopt the following position:

(1) Prior to the consummation of an abandonment, a state condemnation action will not lie because the ICC's authority is exclusive. Compare footnote 2 of the General Counsel's memorandum and Kalo Brick, 450 US. 311, 323 (1981).

(2) After consummation of an abandonment, an ICC decision under Section 10905 does not preempt a subsequent condemnation proceeding under state law.

(3) If so requested by the trial court, the Commission should be prepared to explain how it determined the constitutional minimum value of the line.

I request the General Counsel's office to monitor the progress of this case, and to advise the Commission of any significant developments.

GRESHAM

cc: All Commissioners
General Counsel Broadley
Director Hardy
Acting Deputy Director Gitomer
Clearance Unit

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OFFICE OF COMMISSIONER ANDRE MAY 4 5 00 PM '82

G.C. NO. 82-166

RE: REQUEST FOR COMMISSION INTERVENTION IN DISTRICT COURT CASE RELATED TO DOCKET NO. AB-1 (SUB-NO. 113)F, CHICAGO & NORTH WESTERN TRANSPORTATION CO. - ABANDONMENT BETWEEN OELWEIN, IOWA AND RANDOLH, MINNESOTA

May 4, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

I agree with the General Counsel's recommendation not to intervene.

Frederic N. Andre

cc: All Commissioners
General Counsel Broadley
Clearance Unit

OFFICE OF COMMISSIONER STERRETT

G. C. NO. 82-166

Re: Request for Commission Intervention in District Court Case Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co. - Abandonment Between Oelwein, Iowa and Randolph, Minnesota

May 4, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

I agree with the General Counsel's recommendation. The CNW should be notified that the Commission does not intend to intervene.

Malcolm M. B. Sterrett

cc: All Commissioners
General Counsel Broadley
Director Hardy
Acting Deputy Director Gitomer
Clearance Unit

MAY 5 7 21 AM '82
OFFICE OF THE SECRETARY
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CLEARANCE UNIT

ATTACHMENT B

Interstate Commerce Commission
Washington, D.C. 20423

B

OFFICE OF THE GENERAL COUNSEL

May 11, 1982

Mr. Stuart F. Gassner
Assistant General Counsel
Chicago and North Western
Transportation Company
One North Western Center
Chicago, Illinois 60606

Dear Mr. Gassner:

This letter confirms our telephone conversation on May 5, 1982, with Anne Keating of your office. The Commission voted not to participate in Hayfield Northern Railroad Company v. Chicago and North Western Transportation Company, Civil No. 3-82-376 (D. Minn.).

Should the court request the Commission's views, it will state its position that, prior to the consummation of an abandonment, a condemnation action under state law will not lie because the Commission's authority is exclusive. See Chicago & North Western Transportation Co. v. Kalo Brick & Tile, 450 U.S. 311 (1981). The Commission believes that after the consummation of an abandonment, however, a Commission decision pursuant to 49 U.S.C. 10905 does not preempt a subsequent condemnation action under state law.

The Commission has asked me to monitor the progress of the district court case. I understand that the hearing on CNW's motion to dismiss will be held on May 14, 1982. Would you please inform Cecelia Higgins at (202) 275-7867 of the court's disposition of the motion and of any other significant action taken in the case.

Sincerely yours,

John Broadley

John Broadley
General Counsel

cc: Chairman Taylor

Chairman Control No. 8200957
JB/CEHiggins:pam

G.C. Memo No. 82-166

ATTACHMENT C

OFFICE OF COMMISSIONER STERRETT

G.C. No. 82-524

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co. - Abandonment Between Oelwein, Iowa and Randolph, Minnesota)

December 27, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

I vote not to intervene in the Eighth Circuit proceeding.

Malcolm M. B. Sterrett

cc: All Commissioners
General Counsel Broadley
Clearance Unit

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INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL

OFFICE OF COMMISSIONER GRADISON

G.C. NO. 82-524

RE: HAYFIELD NORTHERN RAILROAD CO., INC. V. CHICAGO AND NORTH WESTERN TRANSPORTATION CO., U.S.C.A., 8th CIR., NO. 82-1880

(RELATED TO DOCKET NO. AB-1 (SUB-NO. 113)F, CHICAGO & NORTH WESTERN TRANSPORTATION CO.--ABANDONMENT BETWEEN OELWEIN, IOWA AND RANDOLPH, MINNESOTA)

December 27, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

I vote not to intervene.

Heather J. Gradison

cc: All Commissioners
Clearance Unit
General Counsel Broadley
Director Hardy
Deputy Director Gitomer

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INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL

OFFICE OF CHAIRMAN TAYLOR

G. C. NO. 82-524

RE: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co. - Abandonment Between Oelwein, Iowa and Randolph, Minnesota)

December 27, 1982

MEMORANDUM TO THE COMMISSION:

I agree with the General Counsel's recommendation not to intervene in this proceeding and so vote.

Reese H. Taylor, Jr.

cc: Clearance Unit
General Counsel Broadley
Director Hardy
Deputy Director Gitomer

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Dec 28 8 19 AM '82
INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL

OFFICE OF COMMISSIONER SIMMONS

December 27, 1982

G.C. No. 82-524

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co. - Abandonment Between Oelwein, Iowa and Randolph Minnesota)

MEMORANDUM TO CHAIRMAN TAYLOR:

I vote not to intervene in this proceeding.

J. J. Simmons, III

cc: All Commissioners
Director Hardy
General Counsel Broadley
Clearance Unit

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DEC 28 9 17 AM '82
INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL

OFFICE OF COMMISSIONER ANDRE

December 27, 1982

G.C. No. 82-524

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co. - Abandonment Between Oelwein, Iowa and Randolph, Minnesota)
Prior G.C. Memoranda Nos. 82-166 and 82-323

MEMORANDUM TO CHAIRMAN TAYLOR:

Please show Commissioner Andre as absent and not participating in the disposition of this proceeding.

Mavis Wiggert

cc: Commissioners
General Counsel Broadley
Clearance Unit

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INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL

OFFICE OF VICE CHAIRMAN GILLIAM

G.C. No. 82-524

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F Chicago & North Western Transportation Co. - Abandonment Between Oelwein, Iowa and Randolph, Minnesota
Prior G.C. Memorandua Nos. 82-166 and 82-323

December 27, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

Please show Vice Chairman Gilliam as absent and not participating in the disposition of this proceeding.

Clyde J. Hart, Jr.

cc: All Commissioners
General Counsel Broadley
Clearance Unit

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INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL

ATTACHMENT D

CEH D

HFR/CEH:jst

OFFICE OF THE GENERAL COUNSEL

February 16, 1983

No. 83-88

MEMORANDUM TO CHAIRMAN TAYLOR:

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co.--Abandonment Between Oelwein, Iowa and Randolph, Minnesota)

Prior G.C. Memorandum Nos. 82-166, 82-323, and 82-524

In prior G.C. memorandum No. 82-524, we informed the Commission of the decision in which the United States Court of Appeals for the Eighth Circuit held that 49 U.S.C. 10905--the provision of the Act for offers of assistance to avoid abandonment--preempts a court action under state law to condemn for continued railroad use a rail line that was abandoned pursuant to a Commission decision. In that memorandum, we recommended that the Commission not intervene in support of the petition of Hayfield Northern Railroad Company ("HN") and the State of Minnesota for rehearing and the Commission agreed.

The Eighth Circuit denied rehearing and HN has asked the Solicitor General to support its petition to the Supreme Court for a writ of certiorari. The Solicitor General has asked for the Commission's views (see attachment A).

We outline below the views that we propose to present by letter to the Solicitor General. The Solicitor General would like us to submit our views immediately. We ask the Commission to inform us by February 18 if it disagrees with our analysis, and if so, to notify us of the views it wishes us to present, if any.

Background

In the interest of brevity, we refer you to the background section in prior memorandum No. 82-524. HN is a corporation composed of shippers that wish to condemn for continued railroad purposes, under a Minnesota statute, a 19-mile line of the Chicago & North Western Transportation Co. ("CNW").

The Court of Appeals Decision[1]/

The court held that the existence of Section 10905 preempts a state law authorizing condemnation of an abandoned rail line for continued railroad purposes; it did not find preemption based on the fact that the shippers that formed HN had invoked Section 10905 by offering to subsidize the line.[2]/

The court found (slip op. 7) that the procedural detail of Section 10905 indicates that Congress "granted the Commission exclusive and plenary authority to provide for continuation of rail service in connection with abandonments." The court reasoned that state law condemnation proceedings would interfere with the explicit time limits in Section 10905 for disposing of offers to purchase or subsidize lines about to be abandoned. The court also noted that a state law condemnation action would circumvent the Commission's determination of the value of the line for purposes of Section 10905. The Court rejected HN's argument that the Commission has recognized in prior decisions that abandoned lines may be condemned under state law.

1/ The decision is attached to prior memorandum No. 82-524. The court of appeals affirmed the district court decision circulated in prior memorandum No. 82-323.

2/ Under Section 10905, a financially responsible person may offer to subsidize or purchase a line that the Commission has authorized the railroad to abandon. If the offeror and the railroad cannot agree on terms, either may request the Commission to establish them. 49 U.S.C. 10905(e). The agency's terms are binding except that the offeror may withdraw its offer within ten days. 49 U.S.C. 10905(f)(2).

The Commission consciously did not participate before the district court or the court of appeals in this case because neither the state law condemnation action nor preclusion of such an action affects the Commission's exercise of its power to regulate the abandonment of service.3/ The court of appeals correctly noted that that power is plenary and exclusive, citing Chicago and North Western Trans. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981). Once abandonment has taken place pursuant to Commission authority, however, the Commission's interest in the rail line has ceased because the line has been found to be not required in interstate commerce.

The fact that the court of appeals decision does not affect the Commission's interests does not mean that other federal government agencies have no interest in the decision. The Department of Transportation may well have an interest because it provides subsidies and other assistance to enable state governments and their political subdivisions to continue rail service on lines that are about to be or have been abandoned. The court of appeals in this case has foreclosed one important means by which states may help to continue rail service without relying on federal subsidies--by allowing condemnation of abandoned rail lines for continued railroad use.

3/ Defendant Chicago & North Western Transportation Company asked the Commission to intervene before the district court in support of its position that Section 10905 preempts a state law condemnation for continued railroad purposes. Appellants HN and the State of Minnesota asked the Commission to intervene before the court of appeals in opposition to that position. The Commission declined both requests.

We believe that the court of appeals' holding presents a significant Tenth Amendment issue because it interferes with the State's choice of purposes for which it authorizes use of an integral governmental function--the power of eminent domain. The condemnation of rail lines for continued rail purposes under a state law is not to be confused with a state's running a railroad, which the Supreme Court has held is not an integral governmental function protected from regulation by the Tenth Amendment. United Transportation Union v. Long Island R. Co., 102 S. Ct. 1349 (1982).

We also believe that the conclusion of the court of appeals that Section 10905 precludes state law condemnation actions for continued rail purposes is not necessarily warranted. Under long-established precedent, the Supreme Court declines to find preemption of a state statute unless there is a clear conflict with a federal statute, Kesler v. Department of Public Safety, 369 U.S. 153, 172 (1962), and will attempt to reconcile the operation of both statutory schemes with one another, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973).

The court of appeals found preemption because the Minnesota state law at issue "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting Section 10905 (slip op. 5). The court largely was concerned that a state law condemnation action was a "protracted legal proceeding" that would undermine the strict time limit imposed in Section 10905 for purchases or subsidy agreements on lines about to be abandoned (id. at 7).

The "delay" inherent in a state law condemnation action does not necessarily harm a railroad because most condemnation statutes provide that the court may order the condemnor to post a bond during the pendency of the action. Therefore, even if a party such as HN has invoked the purchase or subsidy provisions of Section 10905 and then declined to fulfill the terms set by the Commission, at most the railroad will have "lost" 110 days--the statutory time during which any arrangement under Section 10905 for continued rail service is to be completed (see slip op. 6). In a subsequent state law action, a condemnor such as HN will post a bond to compensate the railroad for any damages that the condemnation action should cause.4/ And if a party never invokes Section 10905, but rather only seeks to condemn a rail line for continued rail use, then the railroad never suffers any uncompensated delay.

Although we support generally the contention of counsel for HN that the court of appeals finding of preemption was not mandated, we do not agree with all of his analysis. In his letter to the Solicitor General (attachment B), counsel for HN states that the decision of the Eighth Circuit finding preemption conflicts with Chicago & North Western Transportation Co. v. United States, 678 F.2d 665, 667 (7th Cir. 1982), in which the Seventh Circuit stated that a potential offeror under former Section 10905 "could . . . wait till the line was abandoned and then reacquire it [by eminent domain] at its nonrail value--or even condemn it before abandonment. . . ." We do not agree that there is a conflict. We agree with the court of appeals (slip

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4/ We understand from HN that such a bond was required by the federal district court in this case.

op. 11) that the Seventh Circuit's language was dictum and does not show that the Seventh Circuit believes the opposite of the Eighth Circuit, i.e., that state condemnation laws are consistent with the purpose of Section 10905. Moreover, the Seventh Circuit did not discuss the issue of federal preemption.

Similarly, there is no direct conflict between this decision and Patrick W. Simmons v. ICC, No. 81-2009 (D.C. Cir. December 14, 1982) (circulated in G.C. Memorandum No. 82-518). In Simmons, the D.C. Circuit cited with approval (slip op. 10) the Commission's statement that it lacks jurisdiction to regulate a state's acquisition of an already abandoned rail line. That statement does not indicate any view of whether the Commission's plenary jurisdiction over abandonments extends also to "provid[ing] for continuation of rail service in connection with abandonment," as the court of appeals found in this case (slip op. 7).

We do find a conflict in the philosophies of the Simmons decision and the court of appeals decision in this case, however, because the Simmons court recognized the willingness of state governments to "to undertake programs to retain local rail service and that funding for such programs typically is "short term" (slip op. at 22). In this case, the court of appeals failed to consider an important state function when it found that a federal statute preempted one of the means by which a state can help to retain local rail service after short-term funding is exhausted.

We also find a conflict between the court of appeals decision and the interest of the federal government (largely that of DOT) in encouraging states and their subdivisions to continue rail service that is not required in interstate commerce. In 1973, Congress

enacted a federal entitlement program that allowed states and their subdivisions to continue rail service and provided loans for state acquisition and modernization of rail properties. Sections 401-403, Regional Railroad Reorganization Act of 1973, Pub. L. 93-236, 87 Stat. 985, 1010-1012. In 1976, Congress repealed those provisions and replaced them with a comprehensive local rail service assistance program including both entitlement funds and financial assistance. Sections 803, 805, 806, Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 130-133, 139-143. See also, Chicago & North Western, supra, 678 F.2d 665. As the funds for such entitlement programs diminish in an era of fiscal restraint, the states will depend more on condemnation as a means to continue rail service.

Sufficient copies are attached to permit distribution to the entire Commission.

John Broadley

JOHN BROADLEY
General Counsel

Attachments

cc: Director Hardy
Deputy Attorney W. Michel
Clearance Unit

Attachment A

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

January 25, 1983

John Broadley, Esq.
General Counsel
Interstate Commerce Commission
Room 5211
12th and Constitution, N.W.
Washington, D.C. 20423

Re: Hayfield Northern Railroad v. Chicago North Western Transportation Company
No. 82-1880

Dear Mr. Broadley:

I enclose the papers in Hayfield Northern Railroad v. Chicago North Western. The Solicitor General has been asked to take a position in the case; and would like to have the Commission's views.

Sincerely yours,

Paul M. Bator
Deputy Solicitor General

Enclosures

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JAN 26 2 25 PM '83
INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL

WARD, GRAY & OEHLER, LTD.
ATTORNEYS AT LAW

ROBERT T. WARD
F. JAMES GRAY
WILLIAM OEHLER
ROBERT S. ABDALLAH

103 OMNI BUILDING
1652 GREENVIEW DRIVE S. W.
P. O. BOX 6390
ROCHESTER, MINNESOTA 55903
507-288-5567

BRANCH OFFICE:
HAYFIELD, MINN.
507-477-3424

KASSON, MINN.
507-634-7491

January 24, 1983

OFFICE OF
RECEIVED
JAN 25 1983
SOLICITOR GENERAL

The Honorable Rex Lee
Solicitor General of the
United States
Department of Justice
Pennsylvania & 9th Street
Washington, D.C. 20530

RE: Hayfield Northern Railroad v. Chicago North Western Transportation Company
No. 82-1880 (8th Cir. December 3, 1982)

Sir:

The Hayfield Northern requests that the United States take a position in the above captioned case. In this case the Eighth Circuit decided that the Staggers Act, 49 U.S.C. §10905, preempts Minnesota condemnation law even when a railroad has abandoned a rail line in Minnesota with ICC approval, even after the ICC has relinquished all jurisdiction and interest in the rail line, and even when a statutorily authorized rail company has properly invoked Minnesota condemnation law in order to recommence rail service to citizens in Minnesota.

The Eighth Circuit decision has broad implication to the ordering of federal and state relationships. The States of Minnesota, Iowa, and Wisconsin will join in pleading for Supreme Court review. It is against that backdrop that this request to the United States is made. The Eighth Circuit decision is an unwarranted assault on state sovereignty, reducing the sovereign prerogative of eminent domain to insignificance, while extending the commerce clause beyond the nth degree. Further, the Eighth Circuit decision conflicts with the Supreme Court's instruction to reconcile state and federal schemes if possible before finding preemption. Importantly, the decision of the Eighth Circuit cannot be harmonized with a recent Seventh Circuit case, Chicago & North Western Transportation Company v. U.S., 678 F.2d 665, where the Seventh Circuit stated that a state condemnation would lie after a railroad line had been abandoned. In addition, the D.C. Circuit in Simmons v. ICC, No. 81-2009 (D.C. Cir. Dec. 14,

1982), quoted approvingly the Commission's pronouncement, "that it lacked jurisdiction to regulate state acquisition of an abandoned rail line, since by the process of abandonment the line lost its status as rail property." Slip op. at 10.

I have enclosed copies of the following:

1. Eighth Circuit Decision
2. Hayfield Northern's Eighth Circuit Briefs
3. State of Minnesota's Brief
4. State of Wisconsin Brief
5. Simmons v. ICC
6. 8th Circuit Appendix
7. Comments of AAR
8. Correspondence between Senator Boschwitz and ICC
9. CNW v. U.S.A. (Slip opinion)

Please contact me, if you deem it appropriate at (507)288-5567.

Yours very truly,

WARD, GRAY & OEHLER, LTD.

/Robert S. Abdalian

Robert S. Abdalian

RSA/rca

Enclosures

ATTACHMENT F

OFFICE OF THE SECRETARY
Clearance Unit

No. 83-88

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co.--Abandonment Between Oelwein, Iowa and Randolph, Minnesota)

Prior G.C. Memorandum Nos. 82-166, 82-323, and 82-624

February 22, 1983

MEMORANDUM TO GENERAL COUNSEL BROADLEY:

A majority of the Commission voted, by notation, on February 18, 1983, to approve your recommended analysis circulated February 16, 1983, to be presented to the Solicitor General by letter.

Vice Chairman Sterrett and Commissioner Gradison disagreed with the proposed analysis for the reasons stated in their votes.

A copy of each vote is attached.

Kathy Link

cc: All Commissioners
Director Hardy
Director Hatton
Director Dahlgren
Deputy Director Gitomer
Secretary Mergenovich

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INTERSTATE COMMERCE
COMMISSION
OFFICE OF THE
GENERAL COUNSEL

OFFICE OF CHAIRMAN TAYLOR

G. C. NO. 83-88

Re: Hayfiled Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co.--Abandonment Between Oelwein, Iowa and Randolph, Missesota)

February 17, 1983

MEMORANDUM TO THE COMMISSION:

I vote to approve the proposal of the General Counsel.

Reese H. Taylor, Jr.

cc: Clearance Unit
General Counsel Broadley
Director Hardy

OFFICE OF VICE CHAIRMAN STERRETT

G.C. NO. 83-88

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co.--Abandonment Between Oslwein, Iowa and Randolph, Minnesota)

Prior G.C. Memorandum Nos. 82-166, 82-323, and 82-524

February 18, 1983

MEMORANDUM TO CHAIRMAN TAYLOR:

I disagree with the General Counsel's proposed advice to the Solicitor General, as outlined in G.C. Memorandum No. 83-88. In my view the 8th Circuit Court of Appeals was entirely correct in its decision that Section 10905 preempts the abandonment area. In fact, it is simply inaccurate to suggest that this interpretation prohibits a state from acquiring an abandoned line. On the contrary, as the court pointed out, the state has already had its opportunity to acquire the line and walked away from it.

It is also misleading to suggest that the Commission has no interest in a rail line once it has authorized abandonment. In fact, the Commission has an interest to

ensure that its abandonment order is not frustrated by a party that has already had its day in court.

Finally, it should be noted that the underlying policy of Federal preemption in this area has a very sound basis. In the face of widespread railroad failures Congress has acted in the last ten years to eliminate or minimize regulatory roadblocks which prevented rail carriers from expeditiously shedding unprofitable lines. This Commission should not step back into the past to aid the states in erecting fifty different impediments to the progress made thus far.

Malcolm M. B. Sterrett

cc: All Commissioners
General Counsel Broadley
Director Hardy
Deputy Director Gitomer
Clearance Unit

OFFICE OF COMMISSIONER ANDRE

February 18, 1983

G.C. No. 83-88

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co.--Abandonment Between Oelwein, Iowa and Randolph, Minnesota)

Prior G.C. Memorandum Nos. 82-166, 82-323, and 82-524

MEMORANDUM TO CHAIRMAN TAYLOR:

I concur with the recommendation of the General Counsel.

Frederic N. Andre

cc: Commissioners
General Counsel Broadley
Clearance Unit

OFFICE OF COMMISSIONER SIMMONS

February 18, 1983

G.C. No. 83-88

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co. -- Abandonment Between Oelwein, Iowa and Randolph, Minnesota

---

MEMORANDUM TO CHAIRMAN TAYLOR:

I vote to approve the General Counsel's proposal.

J. J. Simmons, III

cc: All Commissioners
Director Hardy
General Counsel Broadley
Clearance Unit

FEB 18 4 10 PM '83
OFFICE OF THE SECRETARY

OFFICE OF COMMISSIONER GRADISON

G.C. NO. 83-88

RE: HAYFIELD NORTHERN RAILROAD CO., INC. V. CHICAGO AND NORTH WESTERN TRANSPORTATION CO., U.S.C.A., 8th CIR., NO. 82-1880

(RELATED TO DOCKET NO. AB-1 (SUB-NO. 113)F CHICAGO & NORTH WESTERN TRANSPORTATION CO.--ABANDONMENT BETWEEN OELWEIN, IOWA AND RANDOLPH, MINNESOTA)

February 18, 1983

MEMORANDUM TO CHAIRMAN TAYLOR:

I disagree with the views expressed by the General Counsel in his memorandum of February 16, 1983.

We should not base the bulk of our opposition to the 8th Circuit opinion on assumptions about the possible views of DOT.

Second, I am not convinced and we should not represent that there is no cost to a railroad where its property is subject to a specialized condemnation proceeding such as the one involved here.

Third, the discussion of legal conflicts is acceptable as far as it goes, and could be conveyed to the Solicitor, but I do not agree with the discussion of a conflict of philosophies on page 6.

Finally, one day is hardly an adequate time to consider fully the philpsophical questions the General Couhnsel proposes

to discuss. Thus, any response to the Solicitor should focus on legal analysis of case law and not a philosophical discussion.

Heather L. Gradison

Heather J. Gradison

cc: All Commissioners
Clearance Unit
General Counsel Broadley

ATTACHMENT F

Note Attorneys: Copy of brief and attachments are not being distributed to you. If you would like to see attachments, there will be a copy in this office.

F

Joan

HFR/CEH:erb

OFFICE OF THE GENERAL COUNSEL

No. 83-280 July 5, 1983

MEMORANDUM TO CHAIRMAN TAYLOR:

Re: Hayfield Northern Railroad Company, Inc., and State of Minnesota v. Chicago and North Western Transportation Company, No. 82-1579, U.S. Sup. Ct.

Prior G.C. Memoranda Nos. 82-166, 82-323, 82-524, and 83-88

Attached is a Brief for the United States as Amicus Curiae in Support of Appellants that we have drafted for the Solicitor General for filing in this case (Attachment A). This memorandum is to seek authorization for this office to join in the brief as counsel for the Commission, which means that the views we present will be considered to be those of the Commission.

In this case, Hayfield Northern Railroad Company and the State of Minnesota have appealed to the Supreme Court the decision of the United States Court of Appeals for the Eighth Circuit in Hayfield Northern Railroad Co., Inc. v. Chicago & N. W. Trans. Co., No. 82-1880 (8th Cir. Dec. 3, 1982). The court of appeals held that 49 U.S.C. 10905 preempts a state law authorizing condemnation of an abandoned rail line for railroad purposes.

Hayfield Northern and the State sought in the Supreme Court a stay of the court of appeals' mandate. The Solicitor General asked our view of the merits of the case, in which the Commission did not participate in the courts below (see

memoranda Nos. 82-166, 82-323, and 82-524). In memorandum No. 83-88, we presented our view of the merits and asked the Commission to endorse it. The Commission did so; and accordingly we sent the attached letter to the Solicitor General (Attachment B).

Hayfield Northern and the State of Minnesota have filed a Jurisdictional Statement in the Supreme Court urging the Court to reverse the court of appeals. The States of Wisconsin and Iowa have filed briefs in support. Chicago and North Western filed a motion to affirm the court of appeals.

The Supreme Court directed the Solicitor General to file a brief for the United States as amicus curiae. In turn, the Solicitor General asked this office to draft the brief (Attachment C).

The attached draft brief presents views that conform to those expressed in our prior letter to the Solicitor General's office (views that the Commission endorsed) and to the Commission's statements about the scope of its jurisdiction over rail abandonments. We believe that the brief accurately presents the Commission's view that Section 10905 does not preempt condemnation of abandoned rail property for railroad purposes because the Commission's jurisdiction ends when a carrier exercises a Commission-issued certificate of abandonment.

We submitted the draft brief to the Solicitor General on July 1. We wish to inform him as soon as possible as to whether the draft should contain the names of members of my office

and as a result be taken to represent the Commission's views. Accordingly, unless the Commission objects, we will inform the Solicitor General that the draft reflects the views of the Commission on July 8, 1983.

Sufficient copies are attached to permit distribution to the entire Commission.

John Broadley

JOHN BROADLEY
General Counsel

Attachments

ATTACHMENT G

G

OFFICE OF THE SECRETARY
Clearance Unit

G.C. No. 83-~~230~~ 280

Re: Hayfield Northern Railroad Company, Inc. and State of Minnesota v. Chicago and North Western Transportation Company, No. 82-1579, U.S. Sup. Ct.

Prior G.C. Memoranda Nos. 82-166, 82-323, 82-524, and 83-88

July 12, 1983

MEMORANDUM TO GENERAL COUNSEL BROADLEY:

On July 11, 1983, the Commission failed to reach a majority on the request of the General Counsel circulated July 5, 1983.

Chairman Taylor would approve the request of the General Counsel.

Commissioner Andre concurred with the General Counsel's recommendation to file the amicus brief.

Vice Chairman Sterrett objects to the content of the proposed brief for the reasons stated in his vote of February 18, 1983, and stated that the opinions in the draft are not the views of this Commission.

Commissioner Gradison does not agree with the opinions set out in the draft brief and stated that the General Counsel should make clear to the Solicitor General that a majority of the Commission does not endorse the position taken in the brief.

A copy of each vote is attached.

cancel 7-11-83

Sheryl Pearson

cc: All Commissioners
Secretary Mergenovich
Acting Director Lewis
Director Hatton
Director Dahlgren
Deputy Director Gitomer

*Related to AB-1 (Sub-No. 113).

Jul 12 2 3R PM '83

OFFICE OF VICE CHAIRMAN STERRETT

G.C. NO. 83-280

Re: Hayfield Northern Railroad Company, Inc. and State of Minnesota v. Chicago and North Western Transportation Company, No. 82-1579, U.S. Sup. Ct.

Prior G.C. Memoranda Nos. 82-166, 82-323, 82-524, and 83-88

July 7, 1983

MEMORANDUM TO CHAIRMAN TAYLOR:

I object to the content of the proposed brief for the reasons stated in my vote of February 18, 1983. The opinions stated in the draft are not the views of this Commission.

Malcolm M. B. Sterrett

cc: All Commissioners-
General Counsel Broadley

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OFFICE OF COMMISSIONER GRADISON

G.C. 83-280

RE: HAYFIELD NORTHERN RAILROAD COMPANY, INC. AND STATE OF MINNESOTA V. CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, NO. 82-1579, U.X. SUP. CT.

July 11, 1983

MEMORANDUM TO CHAIRMAN TAYLOR:

I do not agree with the opinions set out in the draft brief. The General Counsel should make clear to the Solicitor General that a majority of the Commission does not endorse the position taken in the brief.

Heather J. Gradison

Heather J. Gradison

cc: All Commissioners
Clearance Unit
General Counsel Broadley

OFFICE OF THE SECRETARY
FCC
JUL 12 8 4- PM '83

OFFICE OF COMMISSIONER ANDRE

July 8, 1983

G.C. No. 83-280

Re: Hayfield Northern Railroad Company, Inc. and State of Minnesota v. Chicago and North Western Transportation Company, No. 82-524, U.S. Sup. Ct.

MEMORANDUM TO CHAIRMAN TAYLOR:

I concur with the General Counsel's recommendation to file the amicus brief.

Frederic N. Andre

cc: Commissioners
General Counsel Broadley

OFFICE OF THE SECRETARY
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OFFICE OF CHAIRMAN TAYLOR

G. C. NO. 83-280

Re: Hayfield Northern Railroad Company, Inc. and State of Minnesota v. Chicago and North Western Transportation Company, No. 82-1579, U.X. Sup. Ct.

July 8, 1983

MEMORANDUM TO THE COMMISSION:

I vote to approve the request of the General Counsel.

Reese H. Taylor, Jr.

cc: Clearance Unit
General Counsel Broadley